NO. 21123

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD ALLYN McCULLOUGH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.



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# APPELLEE'S BRIEF

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APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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# APPELLEE'S BRIEF

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## I

## STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On October 20, 1965, the Federal Grand Jury for the Southern District of California returned an indictment in three counts, naming as defendants the appellant, Donald Allyn McCullough and James Sanford Crist. All of the counts of the indictment were based upon alleged violation of Title 18, United States Code, Section 641. The indictment read as follows:

"COUNT ONE

On or about June 27, 1965, in Los Angeles County, within the Central Division of the Southern

District of California, defendants JAMES SANFORD CRIST and DONALD ALLYN McCULLOUGH along with Bruce Donald Davis, Benjamin Rosenberg, Joseph Zaffino, and William Henry Robinson, knowingly and wilfully stole and purloined laboratory equipment, made of platinum, iridium, tungsten and rhodium, from the premises of the Korad Corporation, 2520 Colorado, Santa Monica, California, property of the United States having a value in excess of $100.00.

"COUNT TWO:

From on or about June 28, 1965 to approximately June 30, 1965, in Los Angeles County, within the Central Division of the Southern District of California, defendants JAMES SANFORD CRIST and DONALD ALLYN McCULLOUGH along with Bruce Donald Davis, Benjamin Rosenberg, Joseph Zaffino and William Henry Robinson received, concealed and retained with intent to convert to their own use and gain laboratory equipment made of platinum, iridium, tungsten and rhodium, stolen from the premises of the Korad Corporation, 2520 Colorado, Santa Monica, California, property of the United States having a value in excess of $100.00, which property theretofore had been stolen and purloined as the defendants then and there well know.

"COUNT THREE:

On or about June 29, 1965, in Los Angeles County, within the Central Division of the Southern District of California, defendants JAMES SANFORD CRIST and DONALD ALLYN McCULLOUGH along with Bruce Donald Davis, Benjamin Rosenberg, Joseph Zaffino, and William Henry Robinson knowingly and wilfully, without authority, sold, conveyed and disposed of laboratory equipment made of platinum, iridium, tungsten and rhodium, stolen from the premises of the Korad Corporation, 2520 Colorado, Santa Monica, California, to Howard Martin, Jr., property of the United States having a value in excess of $100.00."

On November 29, 1965, defendant McCullough entered a plea of not guilty to the three counts of the indictment. Jury trial commenced at Los Angeles on December 13, 1965 and continued to December 17, 1965, when the jury returned a verdict of guilty against defendant McCullough on Counts One, Two and Three of the indictment.

On January 17, 1966, after the court denied defendant McCullough's motions for judgment of acquittal or in the alternative for a new trial, judgment of conviction was entered against him on Counts One, Two and Three of the indictment. At the same time, defendant McCullough was sentenced to a term of two years

imprisonment on each of the three counts, to run concurrently.

Defendant McCullough filed a timely notice of appeal on January 17, 1966.

Jurisdiction of the District Court for the Southern District of California, Central Division, was based on Title 18, United States Code, Sections 641 and 3231.

Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

## II

## STATUTES INVOLVED

Title 18, United States Code, Section 641, provides in pertinent part as follows:

> "Whoever . . . steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any . . . thing of value of the United States or of any department or agency thereof, . . . or
>
> "Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been . . . stolen, purloined or converted --
>
> "Shall be . . . [guilty of an offense]."

## III

## QUESTIONS PRESENTED

1. Did the trial court err in failing to direct a verdict of acquittal on the ground that the evidence was insufficient to show that the stolen property was that of the Government and worth in excess of $100.00?

2. May defendant raise for the first time in this Court the issue of whether the question of his guilt on all three counts of the indictment was properly submitted to the jury by the trial court?

3. Did the trial court err in failing to direct a verdict of acquittal on the ground that the only evidence against McCullough was the uncorroborated testimony of his accomplices?

## IV

## STATEMENT OF FACTS

The night of June 27, 1965, the premises of the Korad Corporation of Santa Monica, California were burglarized. The burglary was discovered at 1:45 a.m. on June 28, 1965 by the co-owner of the West Coast Detective Agency and Police Patrol, Mr. George L. Shishim [R.T. 15 & 20]. [1/] Mr. Shishim then discovered that a door on the patio and a glass door located on the

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1/ "R.T." refers to the Reporter's Transcript herein

Colorado Avenue side of the Korad building had been broken [R. T. 24].

On the morning of June 28, 1965, Mrs. Maria A. Pearson, a research chemist for Korad Corporation, discovered that a small filing cabinet in a Korad office had been broken into [R. T. 35 & 63]. Mrs. Pearson also noticed that a cabinet in the chemical-physics laboratory, used to store precious metals, had been tampered with. On the afternoon of June 25, 1965, she had placed a number of platinum crucibles in this cabinet with a combination lock [R. T. 37]. Now, on Monday, June 28, the precious metals in this cabinet were found by her to be missing.

In another cabinet in the office there had been on June 25th two new iridium crucibles, which were also found to be missing [R. T. 37-8]. Patchwork had been done on one of these crucibles by one of the workers in the plant. The appearance of iridum crucibles subsequently recovered and introduced at trial was similar to these at Korad Corporation [R. T. 42, 118]. Other crucibles of nickel, zirconium and platinum also placed in evidence at trial were similar in appearance to those found missing in the burglary at Korad Corporation [R. T. 43]. Indeed, the crucibles of precious metal produced at the trial below were substantially proved to be identical to those taken in the burglary [R. T. 42, 43, 44, 45, 175-177]. These were Exhibits One through Ten in evidence at the trial below.

Mr. Donald Kopczick, the administrative assistant to the controller and security officer at Korad, who was also in charge

of the administration of Korad's Government contracts, was called to the Korad Corporation around 2:30 a.m. on June 28, 1965 by Mr. Shishim and informed of the burglary [R.T. 60]. Mr. Kopczick noticed that the two cabinets used to store the precious metals had been tampered with [R.T. 62]. Mr. Kopczick supervised the computation of the loss. The determination of this loss was computed by taking the purchase orders, which showed the value of each inventory item of precious metal and whether it was charged to the Government or to Korad Corporation [R.T. 68, 78], minus the inventory on hand and credits showing which previous metals had been returned for scrap [R.T. 65].

Mr. Kopczick referred in his testimony below to the Government property record cards showing which contract the property pertained to [R.T. 65]. These contracts were admitted into evidence [R.T. 440]. The government contracts had their own special number series [R.T. 69]. By referring to these cards, the Korad Corporation knew which property the Government owned [R.T. 69-70]. This Government property stock record card was designed by the Korad Corporation in connection with its inventory control system [R.T. 68]. This system was approved by the Air Force Property Administrator, Mr. Howard M. Schultheis. Mr. Schultheis visited the Korad Corporation every three months to analyze all procurement and stock records, purchase orders, invoices, etc. [R.T. 449]. The duration of Mr. Schultheis' visits lasted from five to seven days [R.T. 450].

Mr. Schultheis found that the internal accounting procedure

precious metals but in fact did not do so [R. T. 211].

Zaffino had a discussion with Rosenberg about breaking into the Korad plant [R. T. 217]. Rosenberg then drew Zaffino a map of the layout of the Korad plant [R. T. 248].

On the night of the burglary, Zaffino met with Rosenberg. Rosenberg told Zaffino that he was going to burglarize the plant himself [R. T. 273]. Rosenberg said he had an inside man in the Korad plant who had showed him around [R. T. 274, 304]. Rosenberg stated that there was no alarm system at the Korad plant [R. T. 278]. There is also some indication that McCullough told Rosenberg about the files in the Korad plant [R. T. 416].

On the night of the crime, Robinson broke a window and entered the plant [R. T. 258]. Davis was with him. Davis was in communication with Rosenberg and Zaffino, who were outside the plant, by walkie-talkie [R. T. 255]. Robinson stayed in the plant fifteen or twenty minutes after Davis left [R. T. 261]. After the burglary Davis phoned Zaffino and told him that he had the stuff from Korad [R. T. 264].

After the burglary, McCullough called Martin Metals on the telephone and asked Mr. Martin if he wanted to purchase certain metals which belonged to the platinum group [R. T. 101]. McCullough represented that he was from the firm of Parrish and Bond [R. T. 102]. On or about June 28, 1965 McCullough brought some platinum, in fabricated shapes, to Mr. Martin's office [R. T. 108]. This platinum looked as if it had been rolled or spun [R. T. 108]. Mr. Martin purchased these metals from appellant

McCullough for $1,574 [R.T. 110]. The receipt given was for 15.74 troy ounces of platinum [R.T. 109-118]. On the 29th of June, appellant McCullough came to Martin Metals with a man named Rose. They then sold Martin Metals more platinum. They were issued two checks: one for $1,098 (approximately), and one for $1,213.75 [R.T. 113]. Some material was left at Martin Metals to be tested for its contents. Later a check for $2,589.20 was issued for this material which was iridium [R.T. 114]. This material that was sold to Martin Metals by McCullough and Zaffino had certain marks placed on it by Mr. Martin [R.T. 118]. These markings were for testing the metalic contents of the material [R.T. 120]. Mr. Martin later identified these marks on the witness stand [R.T. 118-120].

Later on Zaffino was sent by Rosenberg to Martin Metals to sell some of the loot [R.T. 132]. A check to Zaffino for $560 for 5.6 troy ounces of platinum was issued to Zaffino by Martin [R.T. 134]. Later on July 12, Zaffino picked up 2 checks from Martin for $1,705 and $1,532, respectively [R.T. 134].

The day after the burglary Rosenberg and McCullough showed up at Zaffino's apartment. Then all three went down to the bank and cashed the checks from Martin Metals. They split the proceeds three ways [R.T. 290]. (Davis was to receive 50% and the inside man, McCullough, Zaffino and Rosenberg were to divide up the rest.) [R.T. 326, 328].

Later on Martin Metals issued a check for $2,300. McCullough took this check to the bank and cashed it [R.T. 293].

McCullough told Zaffino, Rosenberg and Davis that he thought the inside man should get more money because the expected $6,000 to $8,000 burglary turned out to be a $57,000 burglary [R.T. 294].

Martin Metals purchased these metals from the defendants from June through July of 1965 [R.T. 436]. These metals were the proceeds of the Korad burglary described above, and were received in evidence at the trial below.

## V

## ARGUMENT

### A. THE COURT DID NOT ERR IN FAILING TO DIRECT A VERDICT OF ACQUITTAL ON THE GROUND THAT THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT THE STOLEN PROPERTY WAS THAT OF THE GOVERNMENT AND WORTH IN EXCESS OF $100.

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Appellant's Brief [page 3] points out that Maria A. Pearson's testimony indicated that she was unable to specifically identify Government's Exhibits One through Ten as items which had been on the premises of the Korad Corporation and were taken in the burglary of June 27, 1965 [R.T. 33 et seq.]. However, as noted by the appellant, Mrs. Pearson, among other witnesses, did testify that the exhibits resembled certain items which had been on the premises of the Korad Corporation and taken in the burglary [R.T. 45]. Platinum crucibles were locked in a cabinet in the laboratory by Mrs. Pearson in the afternoon on June 25,

1965. In another cabinet were two new iridium crucibles [R. T. 37-8]. Patchwork had been done on one of these crucibles by one of the workers in the plant. The appearance of the iridium crucibles which were introduced into evidence as the fruits of the burglary [Exhibit 10], was like these at Korad Corporation, even to the patchwork [R. T. 42, 118]. Also other crucibles of nickel, zirconium and platinum [Exhibit 4] produced at trial were similar in appearance to those stolen from Korad Corporation [R. T. 43].

According to the testimony of Donald Kopczick [R. T. 65, 67-100], the loss of government property was determined by an internal accounting system. The accounting procedure involved the comparison of purchase orders which indicated the direct charge numbers for governmental contracts involved; these contracts were admitted into evidence [R. T. 452, 491] with inventory cards. There were separate inventory cards for government property. These inventory cards showed the amount of precious metals used in the chemical physics area and to which contract they pertained [R. T. 491]. The inventory cards were then checked against the actual inventory on hand.

The appellant attacks this inventory system stating that there was ". . . great detail (in explaining how the system operated) but (the system) is replete with conclusions of fact without foundational predicate" [at p. 3]. The appellant goes on to state ". . . the conclusions were predicated on the internal inventory record control system of the Korad Corporation and were not based on any other facts offered into evidence" [at p. 4]. It is very

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difficult to see how the loss of property could be otherwise computed than by this accounting process. What stronger evidence could be introduced in order to show proof of loss or a theft?

The substance of Dr. Ricardo G. Pastor's testimony was that the exhibits presented to him appeared to be similar to those on the premises of the Korad Corporation but that he could not specifically identify the exhibits [R. T. 174]. Government's Exhibit 1 was an iridium crucible [R. T. 170]; Exhibit 2 was an iridium crucible containing gadolenum, aluminum, and neodymium in small amounts [R. T. 171]. Exhibit 8 consisted of a tungsten crucible. The dimension of this exhibit corresponded to the specifications of a special crucible that was built for Korad by the Allen Jones Electronics Corp. [R. T. 180].

Also Dr. Pastor's testimony indicated that Korad Corporation was the only company then undertaking Governmental efforts in the utilization of the specific material (referring to gadolinium aluminate) which he had analyzed [R. T. 175].

Mr. Howard M. Schultheis testified that the accounting system of the Korad Corporation conformed to the standards set by the Armed Services Procurement Regulations [R. T. 445-6]. He also testified, while looking at the contracts placed in front of him on the witness stand, that these were CPFF (Cost Plus Fixed Fee) contracts between the United States Government and the Korad Corporation [R. T. 477], pursuant to which the stolen metals were furnished to Korad by the Government. The existence of these contracts was shown by evidence [R. T. 452].

Mr. Schultheis indicated that all governmental contracts with the Korad Corporation had a clause which stated that title to " . . . property furnished by the Government shall remain in the Government" [R. T. 448].

Because of the testimony of the witnesses named above and the evidence introduced at the trial, especially the accounting exhibits and the governmental contracts, the appellant's argument is without merit. The jury was properly permitted to infer that the metals stolen from Korad were property of the United States, of a value more than $100, and that these metals were introduced in evidence at the trial below after they were recovered from Martin Metals. For, when the appellate courts consider an attack upon the sufficiency of the evidence on appeal, the general rule is that they must view the evidence at trial in the light most favorable to the Government.

Glasser v. United States, 315 U.S. 60 (1942);

Noto v. United States, 367 U.S. 290 (1961);

Stein v. United States, 327 F. 2d 825 (9 Cir. 1964), cert. denied 377 U.S. 970.

## B. APPELLANT MAY NOT RAISE FOR THE FIRST TIME IN THIS COURT THE ISSUE OF WHETHER THE QUESTION OF HIS GUILT ON ALL THREE COUNTS OF THE INDICTMENT WAS PROPERLY SUBMITTED TO THE JURY BY THE TRIAL COURT.

---

At trial the Court instructed the jury without including in its instructions the cautionary instruction that defendant McCullough could not be found guilty both of stealing and of receiving the same Government property [R. T. 511-541]. As a result, defendant McCullough was found guilty by the jury on both Count One and Count Two of the indictment; that is, he was found guilty of stealing and receiving the same Government property [R. T. 544-545].

In the case of Milanovich v. United States, 365 U.S. 551 (1961), the Supreme Court held, in construing Section 651 of Title 18, United States Code, that "the trial judge erred in not charging that the jury could convict of either larceny or receiving, but not of both" (365 U.S. at 555). In Milanovich, defendant's counsel had maintained throughout the trial that a thief cannot be convicted of receiving from himself, and had pressed for a jury instruction to the effect that his client could be convicted of larceny or of receiving, but not both (365 U.S. at 352-353).

In the case at bar, the reverse is true. At no time during the trial did McCullough's counsel raise the issue whether his client should be convicted of stealing and receiving the same precious metal crucibles. Nor was an instruction requested to the effect that McCullough could not be so convicted; McCullough's

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In the case at bar, the reverse is true. At no time during the trial did McCullough's counsel raise the issue whether his client should be convicted of stealing and receiving the same precious metal crucibles. Nor was an instruction requested to the effect that McCullough could not be so convicted; McCullough's

counsel pronounced himself satisfied with the instructions as given [R.T. 541]. Thus this issue was never raised at the trial.

This Court of Appeals should not consider on appeal an issue which was never raised at the trial below.

Morales v. United States, 373 F.2d 527 (9 Cir. 1967);

Grant v. United States, 291 F.2d 746 (9 Cir. 1961), cert. denied 368 U.S. 399 (1961).

It is of course true that Rule 52(b) of the Federal Rules of Criminal Procedure permits an appellate court to recognize plain error to which no objection was made in the trial court, in the Court's discretion. This, the Government submits, is a discretion which should not be exercised here in defendant's favor. For defendant received concurrent sentences of two years on each of the three counts of which he was convicted. His sentence was not more severe on account of the multiple findings of guilt which were made by the jury, and appellant was therefore not prejudiced by any error which may have occurred.

## C. THE TRIAL COURT DID NOT ERR IN FAILING TO DIRECT A VERDICT OF ACQUITTAL ON THE GROUND THAT THE ONLY EVIDENCE AGAINST McCULLOUGH WAS THE UNCORROBORATED TESTIMONY OF HIS ACCOMPLICES.

---

Appellant asserts in his brief (at page 7) that his conviction should not be allowed to stand "since it is based on the uncorroborated testimony of accomplices".

It is not true that McCullough's conviction is supported only by accomplice's testimony. On the contrary, witness Howard Martin, an employee of Martin Metals, Inc. and by no stretch of imagination an accomplice of McCullough, gave substantially the following testimony: on June 28 or 29, 1965, after the Korad burglary, McCullough, whom Martin had previously met and from whom he had previously bought precious metals [R.T. 100-104], telephoned Martin and said he had some platinum he wanted to bring over for sale [R.T. 107]. McCullough did come to Martin's place of business, and brought with him some platinum which had been rolled or spun [R.T. 108]. Martin bought this platinum (15.74 troy ounces) from McCullough for $1,574.00 [R.T. 110-111]. On the next morning McCullough returned to Martin's place of business, and brought with him a number of crucibles which he left there for a determination of their metallic content [R.T. 112]. The next afternoon, McCullough returned again, and received a check for $2,589.20 in payment for the crucibles, which were of the platinum group [R.T. 114]. These crucibles were identified by Martin at the

trial as having been purchased by him from McCullough [R. T. 118]. and were in evidence as Government's Exhibit 10. Also, Government's Exhibits 4 (silver crucible tops), 5 (tungsten or molybdenum crucible), 6 (more crucibles), 7, 9, 3, and 8 were identified as metal which had been brought to Martin by McCullough or his accomplices after the Korad burglary [R. T. 119-123]. These are the same metals which resembled the ones taken from Korad in the burglary.

Thus it can hardly be said that appellant was convicted on the uncorroborated testimony of his accomplices. Moreover, the jury was admonished by the Court that the testimony of the accomplices Rosenberg and Davis was to be "received with caution and weighed with great care" [R. T. 524]. Even if their testimony had been the only evidence against McCullough, conviction could have been proper if the jury believed them.

Andett v. United States, 265 F. 2d 837, 846-847
(9 Cir. 1959);

Williams v. United States, 308 F. 2d 664, 666
(9 Cir. 1962);

Williams v. United States, 315 F. 2d 113, 115
(9 Cir. 1962).

## CONCLUSION

For the reasons stated above, the judgments of conviction should be affirmed.

Respectfully submitted,

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